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IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Texas Court of Criminal Appeals

BRIEF OF *AMICI CURIAE* AMBASSADOR L. BRUCE LAINGEN *ET AL.* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The *Avena* Judgment Binds State Courts In Respect Of Individuals Covered By The Judgment. 3

A. The *Avena* Judgment Is Binding in International Law. 3

B. The *Avena* Judgment Is Binding Under the Supremacy Clause. 8

C. The *Avena* Judgment Binds Both Medellín and the State of Texas. 10

1. Mexico's Submission of Medellín's Treaty Claim to the ICJ Is Conclusive of Medellín's Vienna Convention Rights in the United States. 10

2. The United States Represented the Interests of Texas at the ICJ, and Texas Is Bound by the Result. 15

II. This Court Should Instruct The Courts Below To Fulfill U.S. Obligations Under The *Avena* Judgment. 17

Contents

Page

A. The United States Has Continuing Obligations Within the ICJ Dispute Settlement System. 17

B. The Obligation of U.S. Compliance Under U.N. Charter Article 94(1) Is Independent of the Procedure for Security Council Action Under Article 94(2). .. 22

C. This Court Should Resolve Any Open Questions in a Manner That Will Allow the United States to Fulfill Its International Obligations and Achieve Final Settlement of the Dispute With Mexico. 25

CONCLUSION 29

APPENDIX — LIST OF *AMICI* 1a

TABLE OF CITED AUTHORITIES

Page

CASES

International Court of Justice Cases

Aerial Incident of 3 July 1988 (Iran v. U.S.), 1996 ICJ 9 21

Aerial Incidents,
1954 ICJ 99 (U.S. v. Hung.); 21
1954 ICJ 103 (U.S. v. USSR); 21
1956 ICJ 6 (U.S. v. Cz.); 21
1956 ICJ 9 (U.S. v. USSR); 21
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1959 ICJ 276 (U.S. v. USSR); 21
1960 ICJ 146 (U.S. v. Bulg.) 21

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1970 ICJ 4 12

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2007 ICJ No. 103 (May 24, 2007) 12

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Page

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(United States v. Italy),
1989 ICJ 15 ..... 13, 16, 18, 20

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(Can./U.S.), 1984 ICJ 246 ..... 16, 18, 20

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1959 ICJ 6 ..... 13, 21

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2001 ICJ 466 21

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1999 ICJ 916 21

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(Libya v. U.S.), 2003 ICJ 152 21-22

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(Greece v. U.K.),
1924 PCIJ (ser. A), No. 2 12

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1986 ICJ 14 ..... 19, 21, 24

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(Italy v. Fr., U.K., U.S.),
1954 ICJ 19 21

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Page

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1974 ICJ 253, 457 19

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2003 ICJ 161 22

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1952 ICJ 176 ..... 12-13, 20

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1954 ICJ 99 21

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1979 ICJ 7, 1980 ICJ 3 ..... 13, 17, 18

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1998 ICJ 426 22

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539 U.S. 396 (2003) 16, 17, 27

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407 U.S. 1 (1972) 5, 27

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Page

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103 F.3d 210 (1st Cir. 1997) 20

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530 U.S. 363 (2000) 17

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453 U.S. 654 (1981) 14, 27

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542 U.S. 155 (2004) 25

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110 U.S. 63 (1884) 13

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175 U.S. 423 (1899) 5, 13

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544 U.S. 660 (2005) 7, 27

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6 U.S. (2 Cranch) 64 (1804) 25

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540 U.S. 644 (2004) 27

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Page

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State Cases

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Page

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Nuclear Materials,
T.I.A.S. No. 11080 (in force Feb. 8, 1987) 18

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Settlement of Disputes,
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Page

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Page

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Page

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Page

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1961-II Y.B. INT'L L. COMM'N 88-128 26

INTEREST OF THE *AMICI CURIAE*

Amici are professors and scholars of law expert in the fields of international law, international dispute settlement, and the application of international law by courts in the United States.[1] (A List of *Amici* is set forth in the Appendix.) *Amici* are experienced in the work of international tribunals, notably the International Court of Justice (ICJ), and include former officials of the U.S. Department of State who have represented the United States at the ICJ. *Amici* seek to present their views concerning the obligations arising from a final judgment of the ICJ interpreting a treaty of the United States in proceedings in which the United States participated fully, and the respect that should be accorded to the judgment by all courts in the United States, in the context of a petition to allow review and reconsideration of a conviction and death sentence.

Amici limit their submission to questions concerning the ICJ judgment interpreting the consular treaty and the rights that individuals may assert under that judgment and treaty in U.S. courts. They do not take a position on the death penalty; indeed, *Amici* occupy diverse points on the spectrum of opinion about the death penalty, as well as on other political controversies. *Amici* are united in the view that an ICJ judgment interpreting and applying a treaty, rendered pursuant to consensual jurisdiction in a case to which the United States was party and addressing the claims of certain named foreign nationals, is binding on all courts in the United States to which claims under the treaty may be presented in respect of each named individual; that state courts are required to apply the treaty in the manner specified in the judgment; that state procedural default rules cannot foreclose the exercise of treaty rights to a hearing as held by the ICJ in its judgment concerning those individuals; and that petitioner accordingly has the right under the judgment

1. No party other than *Amici* and their counsel authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this *amicus curiae* brief are on file with the Clerk of the Court.

to review and reconsideration of his conviction and sentence. This Court is the proper organ within our federal system to ensure that the state courts comply with the ICJ judgment.

SUMMARY OF ARGUMENT

Petitioner José Ernesto Medellín is one of 49 Mexican nationals now on death row in states of the United States who are named in the final judgment of the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 ICJ 12. Those individuals are similarly situated in that they were not advised in a timely manner of their rights under the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261, to contact the Mexican consular post, were convicted and sentenced to death without benefit of timely consular services, and have been held by the ICJ to be entitled to review and reconsideration of their convictions and sentences as a remedy for that treaty violation – a violation that the United States has acknowledged.

The court below erred in denying the relief that the ICJ has found to be required to redress the treaty violations in *Avena*. *Avena* resulted from a treaty-based judicial process to which the United States fully consented, in which the United States fully participated, and which binds the United States as a whole. The United States consented to the jurisdiction of the ICJ to decide this dispute and is obliged under Article 94 of the U.N. Charter, Article 59 of the ICJ Statute, and the Vienna Convention and its Optional Protocol – four treaties that were in force for the United States at the time of *Avena* – to carry out the judgment. Pursuant to the Supremacy Clause of the Constitution, all courts in the United States are obliged to exercise their judicial powers within their respective jurisdictions consistently with the *Avena* judgment.

This Court has not yet ruled on the effects in state and federal law of a final ICJ judgment addressing treaty-based rights of specific individuals. The judgment was rendered after a thorough adversarial process, in which Mexico represented Medellín's legal interests through the internationally recognized mechanism of diplomatic protection and in which the United States

conclusively represented the legal interests of the state of Texas, in full accordance with international law and U.S. constitutional law. No further action is required in international or U.S. law for the judgment to be fully operative as a rule of decision for state courts, and this Court should therefore instruct the Texas courts to implement it.

ARGUMENT

I. The *Avena* Judgment Binds State Courts In Respect Of Individuals Covered By The Judgment.

The Texas Court of Criminal Appeals erred in taking this Court's decision in *Sanchez-Llamas v. Oregon*, 548 U.S. ___, 126 S.Ct. 2669 (2006), to stand for the proposition that "*Avena* is not binding federal law" in respect of an individual covered by *Avena* itself. App. to Pet. for Cert., p. 20a; *see also* p. 24a, pp. 63a-64a. The decision declining to apply the reasoning in *Avena* for the benefit of petitioners Sanchez-Llamas and Bustillo (whose cases were never presented to the ICJ) could not have determined or affected the binding force of the *Avena* judgment in this case, either under international law or under the Supremacy Clause of the U.S. Constitution. Thus a finding in favor of petitioner Medellín in the present case would in no way be inconsistent with *Sanchez-Llamas*.

A. The *Avena* Judgment Is Binding in International Law.

Under Article 94(1) of the Charter of the United Nations, 59 Stat. 1031, T.S. 993 (1945), "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party." Under Article 59 of the Statute of the ICJ, 59 Stat. 1055, T.S. 993 (1945) [ICJ Statute], which is an integral part of the U.N. Charter,[2] decisions of the Court have "no binding force *except between the parties and in respect of that particular case*" (emphasis added). As the ICJ has recently explained, "Article 59 of the Statute, notwithstanding its negative wording, has at its core the positive statement that

2. *See* U.N. Charter, art. 93 (all U.N. members are *ipso facto* parties to the ICJ Statute).

the parties are bound by the decision of the Court in respect of the particular case."[3] Thus, as between the United States and Mexico in respect of *Avena* (which includes the Medellín matter), the decision of the ICJ incontrovertibly is binding.

By ratifying the U.N. Charter and the annexed ICJ Statute as a treaty with the advice and consent of the U.S. Senate under Article II of the Constitution in 1945, the United States accepted the obligation to comply with ICJ judgments in any cases that would come within the ICJ's consensual jurisdiction in the future. The undertakings to comply with ICJ decisions and to treat them as binding remain in force as treaty obligations of the United States.

The jurisdiction of the ICJ in the *Avena* case was founded on consent and reciprocity under Article 36(1) of the ICJ Statute, which establishes jurisdiction over "all matters specially provided for ... in treaties and conventions in force." The Optional Protocol was a treaty in force under Article 36(1) of the ICJ Statute at the time of *Avena*.[4] Proceedings under Article 36(1) produce binding judgments under Article 59 of the Statute, which are "final and without appeal" under Article 60. As the ICJ has recalled:

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3. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn.-Herz. v. Serbia), 2007 ICJ No. 91, para. 115.

4. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325, T.I.A.S. No. 6820, 596 U.N.T.S. 487. Article I of the Optional Protocol states: "Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by a written application made by any party to the dispute being a Party to the present Protocol."

On March 7, 2005, the United States gave notice of withdrawal from the Optional Protocol. Under principles common to U.S. and international law, that notice cannot have retroactive effect on the obligation to comply with a judgment rendered when the Optional Protocol was fully in force for both parties to the judgment.

> it is in the interest of a party that an issue which has already been adjudicated in favour of that party not be argued again. . . . Depriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes.[5]

A litigant's obligation to carry out judgments against it – made explicit by the terms of the U.N. Charter and ICJ Statute – is implicit in the rule of law.

Amici respectfully emphasize the fully consensual nature of the obligations undertaken when the United States agreed by treaty to the Vienna Convention and to the Optional Protocol's system for binding settlement of disputes arising thereunder. The Optional Protocol serves as a forum selection clause, with the effect that parties that have selected the ICJ as the forum to decide their disputes are bound to carry out its decisions.[6] The United States is free not to enter into treaties, and is free not to accept optional dispute settlement clauses, but once having given consent to a treaty and to a treaty-based dispute settlement system, the United States is bound to comply with the obligations to which it has agreed. Indeed, this Court has long recognized that "an award by a tribunal acting under the joint authority of two countries is conclusive between the governments concerned and must be executed in good faith" (absent fraud or comparable basis for impeachment). *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899).

The Texas court misunderstood the nature of an international judgment in treating *Avena* as not binding. A state court is not free to depart from the terms of a judgment in which an international tribunal exercising a consent-based jurisdiction accepted by the federal political branches has definitively settled a treaty dispute, nor to place conditions on compliance that are

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5. *Bosnian Genocide*, note 3 *supra*, 2007 ICJ No. 91, para. 116.

6. *Cf. Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8-9 (1972); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985).

inconsistent with the judgment itself. It was thus error for that court to continue to apply state rules of procedural default in a manner incompatible with *Avena*'s disposition concerning an individual named in the judgment,[7] as well as to deny the efficacy of the acknowledgment by the President of the United States of the obligatory force of the judgment. By contrast, in Oklahoma, where the case of another individual covered by *Avena* was pending, the state's executive and judicial authorities correctly treated the judgment as binding and granted review and reconsideration.[8]

The President accepts that the United States has incurred "international obligations" under *Avena*; *see* President George W. Bush, Memorandum on Compliance with the Decision of

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7. The ICJ concluded that while the procedural default rule in itself does not violate Article 36 of the Vienna Convention, particular applications of the rule can violate the Convention, namely when a breach of Article 36(1) through failure to inform the individual of his rights precluded the exercise of his own or his country's treaty rights. In *Avena*, the treatment of procedural default and related questions comes under the general heading of "Article 36, paragraph 2," beginning at paragraph 107 of the judgment. *See especially* paras. 111-113, 133-134, 138.

8. *Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. 2004) (unpublished; *reprinted at* 43 INT'L LEGAL MAT. 1227 (2004)) (granting remand for evidentiary hearing), *after remand*, 120 P.3d 1184 (Okla. Crim. App. 2005) (final judicial determination of whether governor's commutation of death sentence overcame any prejudice to defendant from treaty violation); *see* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: Implementation of* Avena *Decision by Oklahoma Court*, 98 AM. J. INT'L L. 581, 582-84 (2004) (Oklahoma governor's office stated that "the ruling of the ICJ is binding on U.S. courts;" Chapel, J., concurring in remand from Court of Criminal Appeals to trial court, wrote: "As this Court is bound by the treaty itself, we are bound to give full faith and credit to the *Avena* decision."). *See also* John R. Crook, *Contemporary Practice of the United States: Oklahoma Court Finds Accused Was Prejudiced by Lack of Consular Notification in Death Penalty Case*, 99 AM. J. INT'L L. 695 (2005); *Oklahoma Court Addresses Proof of Prejudice for Failure to Provide Consular Access*, 100 AM. J. INT'L L. 402 (2006).

the International Court of Justice in *Avena*, Feb. 28, 2005. In its filings in the present matter and in other cases, the United States Government has consistently acknowledged that "the United States has an international obligation under Article 94 [of the U.N. Charter] to comply with the *Avena* decision,"[9] and that the operative provisions of the judgment specify that obligation.[10]

This Court in *Sanchez-Llamas* made a clear distinction between an ICJ judgment and ICJ treaty interpretations outside the framework of such a judgment, both by drawing attention to the terms of Article 59 of the ICJ Statute (quoting the language on binding force "between the parties and in respect of that particular case," 126 S.Ct. at 2684) and by observing that the ICJ's principal purpose is "to arbitrate particular disputes."

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9. *See* Brief for the United States as Amicus Curiae Supporting Respondent at 38-39, *Medellín v. Dretke*, 544 U.S. 660 (2005); Brief for the United States as Amicus Curiae at 18 n. 2, *Ex Parte Medellín* (Tex. Crim. App. Sept. 2, 2005); Brief for the United States as Amicus Curiae Supporting Petitioner (at petition phase) at 11, *Medellín v. Dretke*, S.Ct. No. 06-984.

In *Sanchez-Llamas*, the United States Government likewise confirmed that the United States "is obligated under international law to comply with the judgment of the ICJ in any case to which it is a party." Brief for the United States as Amicus Curiae Supporting Respondents at 29, *Bustillo v. Johnson* and *Sanchez-Llamas v. Oregon*, 548 U.S. ___, 126 S.Ct. 2669 (2006).

10. Following the distinction in international practice between a judgment's operative provisions (*dispositif*) and its reasoning, the U.S. Government's briefs construe "decision" under Article 59 of the ICJ Statute as referring to "the portion of the ICJ ruling with which the United States has an international obligation to comply – what in United States practice would be called the judgment." *See* Brief for the United States as Amicus Curiae Supporting Respondent at 38-39 n. 12, *Medellín v. Dretke*, 544 U.S. 660 (2005); Brief for the United States as Amicus Curiae Supporting Petitioner (at petition phase) at 11 n. 1, *Medellín v. Dretke*, S.Ct. No. 06-984.

In its recent judgment in the *Bosnian Genocide* case, 2007 ICJ No. 91, para. 123, the ICJ confirmed that the operative part of a judgment possesses the force of *res judicata*.

In declining to give conclusive effect to such interpretations at the behest of persons not covered by the judgment, this Court took note that "the United States has agreed to 'discharge its international obligations' in having state courts give effect to the decision in *Avena*." 126 S.Ct. at 2685.

Under the U.N. Charter, the ICJ Statute, and the general international law of dispute settlement, the obligation to comply with the judgment devolves upon the respondent state as a whole and falls to be carried out by the organs of the respondent state having domestic constitutional responsibility for the matters therein. No further step is required on the international level to perfect this obligation. In particular, the Security Council is neither required nor expected to exercise its enforcement powers, unless the respondent state defaults on its obligation to comply. *See* Section II.B *infra*. There is likewise no basis in international law for the suggestion in Part III.B of the opinion below (App. to Pet. for Cert., pp. 43a-47a) that a post-judgment agreement between the United States and Mexico would be needed as a predicate for carrying out the already existing treaty-based obligation to comply with the judgment.

B. The *Avena* Judgment Is Binding Under the Supremacy Clause.

The *Avena* judgment in petitioner's case implements a treaty obligation of the United States which is the supreme law of the land (U.S. Const. art. VI). It thus is binding on all courts in the United States and supplies the rule of decision in a state habeas petition.

The Senate gave unanimous advice and consent to the Vienna Convention and to dispute settlement under the Optional Protocol,[11] and the United States participated fully in the litigation that led to the judgment without questioning the ICJ's jurisdiction. The Vienna Convention binds all treaty partners, regardless of whether they are federal or unitary states; courts

11. *See* 115 Cong. Rec. 30997 (Oct. 22, 1969); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987), Intro. Note to Part III and §§ 301-312, 321; Intro. Note to Part IV, ch. 6 (before § 464); § 465.

in the United States are required to apply it in matters falling within their jurisdiction.[12] The Supremacy Clause gives assurance that the United States will carry out its obligations under Article 36(2) of the Convention, which provides that the laws and regulations of the receiving state "must enable full effect to be given to the purposes" of the rights accorded under Article 36. There has never been the slightest doubt that the Vienna Convention prevails over any inconsistent state law.[13] A final judgment applying the treaty and specifying the remedy for its violation likewise enjoys the status of supreme federal law.

This Court in *Sanchez-Llamas* confirmed the well-established position that "a self-executing treaty binds the States pursuant to the Supremacy Clause" and that:

> where a treaty provides for a particular judicial remedy, there is no issue of intruding on the constitutional prerogatives of the States or the other

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12. The Department of State witness informed the Senate: "The Convention is considered entirely self-executive and does not require any implementing or complementing legislation." Statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State, Before the Senate Committee on Foreign Relations, *reprinted in* Sen. Exec. Rep. No. 91-9, 91st Cong., 1st Sess. (1969), at 5. *See also* RESTATEMENT, Intro. Note before § 464.

13. The priority of treaty law over state law as required by the Supremacy Clause was spelled out explicitly in the State Department's responses to the Senate's questions:

> *Question. What is the effect of the convention on (a) Federal legislation; and (b) State laws?*
>
> Answer [after explaining a possible area of conflict not relevant here].
>
> To the extent that there are conflicts with Federal legislation or State laws the Vienna Convention, after ratification, would govern as in the case of bilateral consular conventions.

Sen. Exec. Rep. No. 91-9, at 18. This official response about the controlling effect of the Vienna Convention raised no concerns in the Senate, which gave unanimous advice and consent.

> federal branches. Courts must apply the remedy as a requirement of federal law.

126 S.Ct. at 2680. While the Court there held that the remedy of suppression of evidence was not required by the Vienna Convention, the approach of *Sanchez-Llamas* is entirely compatible with giving the *Avena* judgment full effect in the courts of the states where the individuals covered by *Avena* are in custody. Because *Avena* specified that the Vienna Convention itself requires municipal courts to supply the remedy for breaches (paras. 121-122, 128-134), all aspects of the present petition are properly understood as implementation of treaty obligations which fall to state courts in the United States to execute.

C. The *Avena* Judgment Binds Both Medellín and the State of Texas.

Respondent has contended that the *Avena* judgment does not qualify as binding federal law because neither Medellín nor the State of Texas was party to the litigation at the ICJ. Brief in Opposition to the Petition for Certiorari (p. 16). This argument misunderstands the nature of international claims settlement through interstate adjudication. Mexico exercised diplomatic protection on Medellín's behalf by bringing his claim of treaty violation to an international tribunal – a practice which has long been recognized in international law and in the jurisprudence of this Court – with the ICJ being the proper channel for resolution of Vienna Convention disputes. Because only states (in the international sense) can be parties to a case at the ICJ under Article 34 of the ICJ Statute, the U.S. government represented all the interests of the United States in responding to Mexico's suit, including the legal interests of Texas and all other states of the Union. The outcome is thus fully conclusive of the legal relationship between Medellín and the state of Texas.

1. Mexico's Submission of Medellín's Treaty Claim to the ICJ Is Conclusive of Medellín's Vienna Convention Rights in the United States.

Mexico brought its case at the ICJ in its own right "and in the exercise of its right of diplomatic protection of its nationals." *See Avena*, 2004 ICJ at 23, 35, 58, paras. 14(1), 14(4), 40, 116.

Medellín's claim was identified as case number 38 in *Avena* and was addressed by name and number at several points in the judgment, including in the operative provisions. *See Avena* at 25, 53-54, 70-72, paras. 16, 106, 153. In the context of addressing and rejecting the U.S. contention that the claims should be considered inadmissible in respect of any individual who had not yet exhausted municipal remedies, the ICJ observed that the treaty rights of Mexico and of its nationals are interdependent. *Avena* at 34-36, paras. 38, 40. Because of this interdependence, the ICJ found it unnecessary to address the claims under a distinct heading of diplomatic protection. *Ibid.* It follows that the ICJ's adjudication of the necessarily interdependent rights of the state and its nationals is fully conclusive of both sets of rights.

Under international law and practice, it is well-established that states may exercise diplomatic protection on behalf of their nationals by invoking the consent-based jurisdiction of international tribunals, whose judgments then produce a definitive settlement of the claims so presented.[14] U.S. diplomatic practice and the decisions of this Court are fully consistent with the view that an individual's claim can be

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14. On diplomatic protection in general, see International Law Commission [ILC], Draft Articles on Diplomatic Protection adopted by the ILC at its 58th Session (2006) and official commentaries, *in* ILC, *Report on the Work of its 58th Session*, U.N. Doc. A/61/10 (2006), and the first and seventh reports of the ILC's special rapporteur on diplomatic protection, John R. Dugard, *in* U.N. Doc. A/CN.4/506 (Mar. 7, 2000) and U.N. Doc. A/CN.4/567 (Mar. 7, 2006).

The term "espousal" is often used when a state, in the exercise of diplomatic protection, takes up the claim of one of its nationals and makes the claim its own. Because Mexico in *Avena* was asserting its own rights as well as those of its nationals, the ICJ properly concluded that the exhaustion of local remedies rule (required in ordinary espousal cases), was not applicable to the interdependent claims. *See Avena* at 35-36, para. 40. For purposes other than exhaustion, however, and in particular for the application of this Court's jurisprudence concerning espousal (*see infra*), it is correct to consider that Mexico espoused the claims of its nationals.

conclusively resolved through this form of intergovernmental dispute settlement procedure. Ever since the arbitral commissions constituted under the Jay Treaty in the earliest days of the American Republic, it has been understood that claims of foreign nationals against the United States (including states of the United States), and claims of U.S. nationals against foreign states, can be taken up by their respective governments and presented to international tribunals, and that the outcome of the interstate dispute settlement procedure binds both the states and their nationals and can have conclusive effects within the U.S. legal system. *See generally* Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833, 838, 842-43, 851-62, 865-66, 877-82 (2007) (surveying two centuries of U.S. diplomatic practice and analyzing relationship between international tribunals and U.S. legal system, in support of conclusion that supranational adjudication with binding and preclusive effects in U.S. law is historically well-grounded and presents no constitutional difficulties); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 713 cmt *a* (state whose national has been injured may invoke remedies under international agreement, including resort to ICJ).

The ICJ (carrying on the jurisprudence of its predecessor, the Permanent Court of International Justice) has been a significant forum for the presentation of claims of injury to a state's nationals.[15] Several of the cases initiated by the United States at the ICJ have involved claims brought in the exercise of diplomatic protection of U.S. nationals, with or without a parallel claim of injury to the United States in its own right. The first ICJ case brought by the United States, *Rights of Nationals of the United States of America in Morocco*

15. *See, e.g., Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (ser. A), No. 2; *Barcelona Traction Light & Power Co. Ltd.* (Belg. v. Sp.), 1970 ICJ 4. The most recent ICJ decision, *Diallo* (Guinea v. D.R. Congo), 2007 ICJ No. 103 (May 24, 2007), addresses issues of diplomatic protection (paras. 39, 45) with reference to the ILC Draft Articles, note 14 *supra*.

(Fr. v. U.S.), 1952 ICJ 176, involved protection of U.S. nationals in what was then a French protectorate; the judgment was taken as definitively resolving the dispute over the rights of the nationals in question.[16] In *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 ICJ 7, 1980 ICJ 3, the United States invoked four treaties to bring claims to the ICJ on behalf of U.S. nationals who were being held hostage in Iran and received a final judgment upholding the claims. In *Elettronic Sicula S.p.A. (ELSI)* (U.S. v. Italy), 1989 ICJ 15, the United States presented a claim to the ICJ on behalf of Raytheon Corporation (a U.S. national) and its Italian subsidiary. The ICJ judgment on the merits definitively resolved the corporations' claims.[17]

The jurisprudence of this Court has long recognized that when a government exercises diplomatic protection by submitting claims of its nationals to an international tribunal, the government makes the claim its own, with conclusive effects on the individual's rights. *See, e.g., Frelinghuysen v. Key*, 110 U.S. 63, 71-73 (1884); *United States ex rel. Boynton v. Blaine*, 139 U.S. 306, 323 (1891); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 459-63 (1899). These decisions confirm that the presentation of a national's claim to an international tribunal entails a definitive settlement of the dispute, and that

16. *See Treaty Rights of the United States in Morocco: International Court of Justice Ruling of August 27, 1952*, DEP'T STATE BULL., Oct. 20, 1952, at 620-623 (on dismissal of cases pending in U.S. consular courts as a result of the ICJ decision); AIDA AZAR, L'EXÉCUTION DES DÉCISIONS DE LA COUR INTERNATIONALE DE JUSTICE 42-43, 93 n. 253 (2003) (citing French court decisions applying the treaty according to the ICJ's judgment).

17. For an example of a diplomatic protection case with the United States as respondent, see *Interhandel* (Switz. v. U.S.), 1959 ICJ 6, 27 and the related case at this Court *sub nom. Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958). The ICJ dismissed the *Interhandel* claim in light of the pendency of the U.S. proceeding; since the international case did not continue to final judgment, the question of the effects in domestic law of such a judgment did not arise.

an individual's legal interests can be conclusively determined through that international procedure, even over his or her objection.

Presentation of claims to an international tribunal can decisively alter the rules of law applicable in domestic courts, even in cases that were already pending in the U.S. legal system. In *Dames & Moore v. Regan*, 453 U.S. 654, 679, 685 (1981), this Court held that U.S. companies would have to abide by an international dispute settlement procedure resulting from the U.S. government's espousal of their claims, regardless of their objections to that procedure; their pending claims in U.S. courts were accordingly dismissed and sent to binding arbitration. Similarly, Mexico's exercise of diplomatic protection over Medellín's claim (along with that of the other Mexican nationals covered by the *Avena* proceeding) has necessarily produced conclusive legal effects as regards the rights of Medellín under the treaty invoked at the ICJ, which control the result within the U.S. legal system. Not only Mexico's rights on the interstate level, but Medellín's treaty-based rights in domestic law as well, have been conclusively determined through the procedure that produced the *Avena* judgment.

In the adversarial proceeding at the ICJ, Mexico produced evidence about the specific factual situations of the 51 individuals whose claims were presented, as set forth in the written pleadings and documents filed with the Court and the verbatim record of the oral hearings.[18] The United States had a full opportunity to dispute Mexico's presentation of Medellín's claim in its own written submissions and at the hearing in The Hague; indeed it not only put Mexico to its proof on each

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18. Application Instituting Proceedings, *Avena and Other Mexican Nationals* (Mex. v. U.S.), at 30-31, paras. 196-200 (Jan. 9, 2003); Memorial of Mexico, at 183 & A1192-A1212 (June 20, 2003); Letter from Mexico, Nov. 26, 2003, annex and appendix (Medellín's birth certificate and declaration); Verbatim Record, Dec. 15, 2003, 10:00 a.m., at 51 n. 54, 68 nn. 103-104, 70 n. 111; Dec. 18, 2003, 10:00 a.m., at 20 n. 19. The pleadings and record of the hearing are posted on the ICJ website, www.icj-cij.org.

individual's case but also contested specific facts and the inferences to be drawn from the facts.[19] The result of this adversarial contestation is a final judgment that articulates reasons for accepting some but not all of Mexico's submissions and that specifies the remedy with significant attention to U.S. concerns.[20] Claims of Mexican nationals that were fully litigated in The Hague are thus not open to reexamination in any U.S. forum in which the Vienna Convention rights of those 51 individuals might be called into question.

2. The United States Represented the Interests of Texas at the ICJ, and Texas Is Bound by the Result.

Article 34(1) of the ICJ Statute provides: "Only states may be parties in cases before the Court." Mexico therefore had to bring its suit against the United States as the relevant party to the ICJ Statute, the Vienna Convention, and the Optional Protocol. The United States is responsible in international law for the actions and omissions of states of the United States in violation of international obligations, *see* RESTATEMENT, § 207, Reporters' Note 3, and this responsibility extends to the determination by an international tribunal of liability for a violation.[21]

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19. Counter-Memorial of the United States at 71 n. 148, 155 n. 338, 186 n. 396; Verbatim Record, Dec. 16, 2003, 10:00 a.m., at 43 n. 41; Dec. 16, 2003, 3:00 p.m., at 39 n. 47.

20. For indications that the adversary process had a noticeable impact on the terms in which the operative provisions of the judgment were framed, see, *e.g.*, *Avena* at 60-61, 68-69, paras. 123, 127, 147-150 (explaining reasons for declining to order annulment of convictions, suppression of confessions, and cessation of continuing violation).

21. In the early 20th century, in preparation for arbitration with Mexico involving protection of nationals of one country in the other's territory, State Department lawyers sought instructions on how to deal with legal issues concerning actions of states of the Mexican federation, in light of mirror-image considerations of U.S. federalism. The Department replied that "in our dealings with foreign Governments having a federal system similar to our own, we have invariably insisted on the liability of the Federal Government." 5 G. HACKWORTH, DIGEST OF

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In ICJ practice, it has frequently been the case that the underlying claim involves actions or omissions of a subnational entity (including units of federal states) or other legal relationships in which the interests of a subnational unit are directly implicated. Several ICJ cases in which the United States has been party as applicant or respondent have been of this type. In *ELSI*, the United States as applicant complained of actions taken by authorities of a local government against a U.S. corporation and its Italian subsidiary; the international claim could be brought only against the state of Italy, even though it was the actions of local rather than national authorities that were challenged. In *Gulf of Maine (Delimitation of the Maritime Boundary in the Gulf of Maine Area)* (Can./U.S.), 1984 ICJ 246, the matter was submitted to the ICJ by a special agreement concluded by the two federal governments whose representatives pleaded and argued the case in The Hague. The boundary line drawn in the judgment is dispositive not only of the federal interests involved, but also of the rights of the several U.S. states and Canadian provinces in the disputed maritime area.[22]

The conclusion that Texas is bound by the *Avena* judgment is compelled not only as a matter of international law, but also by the decisions of this Court. *See, e.g., United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942) (state law must give way before superior federal policy evidenced in claims settlement agreement). In *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), this Court confirmed that a federal policy in favor of achieving "legal

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INTERNATIONAL LAW 593, 597 (1943) [HACKWORTH]. *See also* 2 JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 1421, 1439-40 (1898) ("[F]or treaty purposes the separate States are nonexistent.").

22. *Cf. United States v. California*, 332 U.S. 19, 35, 38-39 (1947) (confirming "paramount rights" of federal government in maritime zone and observing that "[t]he very oil about which the state and nation here contend might well become the subject of international dispute and settlement").

peace" with foreign governments had to prevail over a state law affecting the jurisdiction of state courts.[23] The structural constitutional logic by which this Court has consistently subordinated state interests to federal policy on international claims settlement applies equally to the federal government's acceptance of the international dispute settlement procedure that produced the *Avena* judgment.[24]

II. This Court Should Instruct The Courts Below To Fulfill U.S. Obligations Under The *Avena* Judgment.

A. The United States Has Continuing Obligations Within the ICJ Dispute Settlement System.

It is critical for the United States to uphold the obligatory character of judgments rendered under dispute settlement clauses to which it has agreed, in order to secure the benefits of compliance by other participants under comparable treaties. The United States was the first state to turn to the ICJ in a Vienna Convention dispute, when it brought an application against Iran concerning U.S. diplomatic and consular personnel held hostage in Tehran in 1979. *See United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 ICJ 7, 1980 ICJ 3, 5, 24-26. The U.S. pleadings in that matter analyze the obligation of parties to the Optional Protocol when disputes arise to abide by ICJ decisions. *See* 1979 ICJ Pleadings, *United States Diplomatic and Consular Staff in Tehran*, at 141-52. When the ICJ indicated provisional measures in 1979 and entered judgment in 1980,

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23. Contrary to the views of four judges of the Texas court (Part III.B of the opinion below), *Garamendi*'s rationale does not require the conclusion of a separate executive agreement to carry out obligations that already exist under multiple Article II treaties, nor does international law require the national executive to enter into a redundant agreement.

24. In *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 383 (2000), this Court invalidated a state law that had embroiled the national government for some time in an international dispute settlement procedure, even though those proceedings had been suspended by consent. *A fortiori*, in the face of a binding judgment from treaty-based dispute settlement, a state rule must not impede treaty compliance and a judicial remedy must be available.

the United States insisted on Iranian compliance and invoked the ICJ's decisions in U.S. and foreign tribunals.

Approximately 70 U.S. treaties now in force contain obligations comparable to those in the Optional Protocol for submission of treaty-based disputes to the ICJ.[25] These include bilateral and multilateral treaties involving substantial economic, political, and other interests. The United States is a frequent litigant at the ICJ, both as applicant and as respondent. Indeed, the United States has been involved in more ICJ cases than any other state:[26] in total, the United States has been party to 21 cases at the ICJ,[27] of which 10 have been brought by the United States as applicant or by special agreement and 11 have been brought against the United States.[28] Since each of the 70 treaties

25. *See* Fred L. Morrison, *Treaties as a Source of Jurisdiction, Especially in U.S. Practice*, *in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 58-81 (Lori F. Damrosch ed., 1987) [CROSSROADS]. To the best of *Amici*'s knowledge, with only three exceptions (see below), all such treaties remain in force for the United States in 2007, as specified for each such treaty in the Department of State publication, TREATIES IN FORCE. Two treaties with ICJ clauses came into force for the United States after completion of the Morrison study: the Convention on the Physical Protection of Nuclear Materials, T.I.A.S. No. 11080 (in force Feb. 8, 1987), and the International Convention on the Taking of Hostages, T.I.A.S. No. 11081 (in force Jan. 6, 1985).

In 1985 the United States gave notice of termination of jurisdiction under the optional clause of Article 36(2) of the ICJ Statute and of a treaty of friendship with Nicaragua (the bases of jurisdiction involved in the *Nicaragua* case, note 30 *infra*, and in 2005 gave notice of withdrawal from the Optional Protocol under the Vienna Convention.

26. For a listing of all ICJ cases grouped by state, see the ICJ website at www.icj-cij.org.

27. The United States has also taken part in almost all proceedings for advisory opinions under Article 65 of the ICJ Statute. *See* Goler Teal Butcher, *The Consonance of U.S. Positions with the International Court's Advisory Opinions*, *in* CROSSROADS at 423; for a current listing, see ICJ Website.

28. The cases initiated by the United States include seven involving Soviet-bloc aerial incidents, as well as *Tehran Hostages* (Iran 1979-81), *Gulf of Maine* (Canada 1981-84), and *Elettronica Sicula S.p.A. (ELSI)* (Italy 1987-89).

with an ICJ dispute settlement clause entails obligations under those treaties and under the U.N. Charter (art. 94) and ICJ Statute (arts. 36(1), 59), failure to carry out *Avena* could prejudice the ability of the United States to hold other states to their dispute settlement obligations and to sustain U.S. credibility before the ICJ in future proceedings.

The United States has a major stake in maintaining a record of abiding by the outcome of ICJ dispute settlement, not least because it continues to be active in that forum. Compliance with ICJ final judgments has generally been high, including in the cases in which the United States has been a party.[29] States have exceptionally disregarded ICJ rulings when they contested the Court's consensual jurisdiction, notably where respondents insisted that the ICJ had been granted no competence to decide a matter involving a state's vital security interests.[30] In the present

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29. Recent studies find compliance with two-thirds of the ICJ's substantive judgments and as high as 80% compliance with final judgments over a substantial period. *See* Colter Paulson, *Compliance With Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434, 456-460 (2004) (compliance rate of 60% with judgments issued in last 15 years; likelihood that rate would go up to 80% rate for prior periods in light of efforts to comply over time); Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1308-1311 (2004) (overall compliance rate of 68%, counting disregard of provisional measures as noncompliance); Jonathan I. Charney, *Disputes Implicating the Institutional Credibility of the Court*, *in* CROSSROADS at 288, 310-319 (only 5 cases of noncompliance with final judgments 1946-1986). The ICJ's current president observed that the ICJ's judgments are "almost invariably" complied with; out of 91 cases between 1946 and 2006, only 4 have presented compliance problems. *See* Judge Rosalyn Higgins, *Speech at U.N. University: The ICJ and the Rule of Law* 6 (Apr. 11, 2007), *available at* http://www.unu.edu/events/files/2007/20070411_Higgins_speech.pdf).

30. See especially the U.S. position on *Military and Paramilitary Activities in and against Nicaragua* (Nic. v. U.S.), 1986 ICJ 14, discussed at 24 *infra*. France denied the existence of proper ICJ jurisdiction in *Nuclear Tests* (Austl. & N.Z. v. Fr.), 1974 ICJ 253, 457. The United

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case, by contrast, jurisdiction was by consent and no security interest would be prejudiced by compliance. Indeed, the President's memorandum on compliance with *Avena* confirms the national interest in fulfilling this international obligation.

Implementation of ICJ judgments has proceeded smoothly in almost all treaty-based cases and those involving the rights of aliens within a state's territory. In the first case leading to a final judgment involving the United States, *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 ICJ 176, the United States and France promptly complied with the judgment, making known that it would be given full effect within the relevant jurisdictions.[31] In *Gulf of Maine* (Canada/ U.S.), 1984 ICJ 246, the final judgment drew a maritime boundary; both sides accepted the judgment and promptly complied with it.[32] In *ELSI*, 1989 ICJ 15, the United States

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States and France reacted to these cases by withdrawing from the general compulsory jurisdiction clause of Article 36(2) of the ICJ Statute, while maintaining treaty-based acceptances under Article 36(1).

31. The final judgment in *Morocco* had elements requiring implementation by each side. The United States dismissed all cases before U.S. consular courts in Morocco that were outside the limits of jurisdiction specified by the ICJ, and French courts relied on the judgment in local (Moroccan) and appellate rulings (by the *Cour de cassation*), which referred to the ICJ judgment as dispositive. *See* Manley O. Hudson, *The Thirty-First Year of the World Court*, 47 AM. J. INT'L L. 1, 8, 14-15 (1953); Note, *Judicial Decisions: Morocco–Criminal Jurisdiction over U.S. Citizens– . . . –International Court of Justice*, 49 AM. J. INT'L L. 263, 267 (1955); CHRISTOPH C. SCHREUER, DECISIONS OF INTERNATIONAL INSTITUTIONS BEFORE DOMESTIC COURTS 33-34, 199, 221 n. 100 (1981) (French courts "do not seem to have regarded any domestic implementing measures for the application of the International Court's judgment as being necessary;" direct application of decision derived from French submission to ICJ jurisdiction).

32. Compliance having been assumed, only a few cases refer to the ICJ judgment. *See, e.g., Conde v. Starlight I, Inc.*, 103 F.3d 210 (1st Cir. 1997) (Hague Line mentioned); *Comeau's Sea Foods Ltd. v. Canada*
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embraced the ICJ forum as the last recourse of its diplomatic efforts and accepted the judgment as dispositive of the claims it had raised on behalf of U.S. investors.[33] Thus, apart from *Nicaragua* (addressed in Section II.B *infra*) and such continuing problems as may exist in the wake of *Avena*, the United States has complied with all final ICJ judgments addressed to it and has benefited from the compliance of all of its adversaries with final judgments addressed to them, except for Iran in the *Tehran Hostages* case.[34]

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(Minister of Fisheries and Oceans), [1992] 3 F.C. 54 (Can. Fed. Ct.), *rev'd*, [1995] 2 F.C. 467, *aff'd*, [1997] 1 S.C.R. 12 (plaintiff sought fishing license in area awarded to Canada by ICJ); *Mersey Seafoods Ltd. v. Minister of Nat'l Revenue*, [1985] 2 C.T.C. 2485 (Can. Tax Ct.), paras. 142-147 (ICJ decision became available after arguments concluded).

33. *See* Terry D. Gill, *International Court of Justice – Diplomatic Protection – U.S.-Italian Treaty of Friendship, Commerce and Navigation*, 84 AM. J. INT'L L. 249, 257 (1990).

34. In addition to the cases discussed in the text and *LaGrand* (F.R.G. v. U.S.), 2001 ICJ 466, which resulted in a final judgment against the United States after the individuals in question had already been executed, the disposition of the remainder of the 21 cases to which the United States has been party is as follows:

Dismissal on Threshold Ground (No Jurisdiction or Claim Inadmissible): The seven Soviet-bloc *Aerial Incident* cases were dismissed for lack of jurisdiction. 1954 ICJ 99 (U.S. v. Hung.); 1954 ICJ 103 (U.S. v. USSR); 1956 ICJ 6 (U.S. v. Cz.); 1956 ICJ 9 (U.S. v. USSR); 1958 ICJ 158 (U.S. v. USSR); 1959 ICJ 276 (U.S. v. USSR); 1960 ICJ 146 (U.S. v. Bulg.). *Monetary Gold Removed from Rome in 1943* (Italy v. Fr., U.K., U.S.), 1954 ICJ 19, was dismissed for lack of an indispensable party. *Interhandel* (Switz. v. U.S.), 1959 ICJ 6, was dismissed for failure to exhaust local remedies. *Legality of Use of Force* (Yugo. v. U.S.), 1999 ICJ 916, was dismissed for lack of jurisdiction.

Dismissal Upon Settlement: *Aerial Incident of 3 July 1988* (Iran v. U.S.), 1996 ICJ 9, was discontinued after the United States agreed to make an *ex gratia* payment. *Lockerbie (Questions of Interpretation and Application of the 1971 Montreal Convention)* (Libya v. U.S.), 2003

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In view of the U.S. interest in credible fulfillment of dispute settlement undertakings, this Court should ensure that the courts below uphold the U.S. obligations to carry out the final judgment in *Avena*.

B. The Obligation of U.S. Compliance Under U.N. Charter Article 94(1) Is Independent of the Procedure for Security Council Action Under Article 94(2).

Respondent has further contended that the *Avena* judgment has no legal force in Texas because the U.N. Charter provides for an "international" remedy – that is, the mechanism under Article 94(2) of the Charter for an aggrieved state to ask the Security Council for international measures to enforce an ICJ judgment. Brief in Opposition to the Petition for Certiorari (p. 16). This argument is based on a misunderstanding of the relationship between Articles 94(1) and 94(2) of the Charter. The binding judgment that resulted from the ICJ procedure does not require any Security Council action in order to bring about conclusive legal effects in both international and domestic law. The judgment can thus operate as a rule of decision in the courts of the respondent state, including the state of Texas in the present case.

It is neither required nor expected that the U.N. Security Council would exercise its powers under Article 94(2) of the U.N. Charter as a predicate for compliance with the judgment in domestic law or otherwise. As shown in Section II.A above, almost all litigants at the ICJ have carried out final judgments pursuant to Article 94(1), without the need for prevailing parties to invoke the mechanism of Article 94(2), which remains

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ICJ 152, was discontinued upon an overall settlement. *Vienna Convention on Consular Relations* (Para. v. U.S.), 1998 ICJ 426, was discontinued after provisional measures and before the merits.

Dismissal on Merits: *Oil Platforms* (Iran v. U.S.), 2003 ICJ 161, was dismissed on the merits of both Iran's claim and the U.S. counterclaim.

available (subject to potential veto on the part of permanent members of the Security Council) as a last resort.

Under international law, each state decides within the framework of its own constitutional system how to carry out its international legal obligations. Respondent states have taken action within their own judicial systems to implement ICJ judgments involving national criminal jurisdiction, as Belgium did in the *Arrest Warrant* case.[35] The *Avena* judgment properly leaves it to the United States, "by means of its own choosing" (para. 153(9)) to determine how to put the judgment into effect. Within the U.S. constitutional system, one means to give effect to the *Avena* judgment, as confirmed by the President in his memorandum on compliance with *Avena*, is for state courts to apply it as binding federal law.

Because respondent states have generally complied with ICJ judgments in accordance with Article 94(1), resort to the Security Council has been exceedingly rare and no enforcement measure has ever been ordered under Article 94(2).[36] Only once

35. After the ICJ decision in *Arrest Warrant of 11 April 2000* (D.R. Congo v. Belg.), 2002 ICJ 3 (also known as *Yerodia*), holding that Belgium was required to cancel an arrest warrant for the sitting foreign minister of the Congo, Belgian courts canceled the warrant in that case and other similar prosecutions. *See* Jan Wouters, *The Judgement of the International Court of Justice in the* Arrest Warrant *Case: Some Critical Remarks*, 16 LEIDEN J. INT'L L. 253, 266 (2003); Alain Winants, *The* Yerodia *Ruling of the International Court of Justice and the 1993/1999 Belgian Law on Universal Jurisdiction*, 16 LEIDEN J. INT'L L. 491, 505-07 (2003) (Belgian court decisions terminating prosecutions following ICJ ruling altered outcomes from what advocates had expected under preexisting understandings of legal doctrine and legislative intent).

36. *See* CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 38-62, 417-18 (2004). In a few cases, the prevailing party refrained from pressing its case at the Security Council because a permanent member had made known that it would veto such a proposal. This was the case during the Tehran hostage crisis, when the Soviet Union had already been blocking U.S. proposals for U.N.-mandated sanctions against Iran; a Soviet veto of any measure under Article 94(2) to enforce the ICJ's 1980 final judgment against Iran was therefore seen as inevitable. *Id.* at 315.

did a prevailing party formally invoke the Article 94(2) procedure to seek enforcement of a final judgment – *Military and Paramilitary Activities in and against Nicaragua* (Nic. v. U.S.), 1986 ICJ 14 – which resulted in a U.S veto.[37] That situation was quite different from the present one, however, for the reason (among others) that the United States had consistently denied the ICJ's jurisdiction over the matter and considered the dispute to involve its security interests.[38] The hypothetical availability of the Article 94(2) procedure surely does not require Mexico to pursue that route where, as here, the President accepts the obligation of compliance under Article 94(1) and has indicated a proper domestic forum through which compliance should take place.

In this case of first impression, in which the federal policy clearly favors judicial implementation of an acknowledged international obligation, this Court should view the President's decision as an appropriate step in the sequence of domestic measures through which the United States, "by means of its own choosing," has determined to carry out its international obligations. It now remains only for this Court to remove any impediments to compliance which may have arisen from the lower court's misinterpretation of this Court's previous rulings or misunderstanding of the relationship between treaty obligations and domestic law.

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37. The fact of that veto was part of the context in which a lower federal court held that an ICJ judgment was not enforceable in domestic courts. *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937-38 (D.C. Cir. 1988).

38. *See* text at note 30 *supra*. The ICJ's *Nicaragua* judgment entailed aspects of international law (use of military force) that are generally considered nonjusticiable in U.S. law. The plaintiffs who sought to enforce the *Nicaragua* judgment were strangers to the ICJ case, *see* 859 F.2d at 938, while *Avena* explicitly deals with petitioner's situation and specifies the remedy for his claims under a self-executing treaty. Also, Congress and the President had repudiated the *Nicaragua* judgment in a subsequent conflicting statute, which the court of appeals found controlling. *See* 859 F.2d at 936-37. Here, no statute rejects *Avena*, and the President has formally endorsed compliance through state courts.

C. This Court Should Resolve Any Open Questions in a Manner That Will Allow the United States to Fulfill Its International Obligations and Achieve Final Settlement of the Dispute With Mexico.

For more than two centuries, this Court's decisions have shown appropriate regard for fulfillment of the international obligations of the United States. *See, e.g., Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804); *F. Hoffmann-LaRoche Ltd. v. Empagran, S.A.*, 542 U.S. 155, 164 (2004). Just as an act of Congress ought never to be construed to place the United States in violation of international law if any other possible construction remains, *Charming Betsy* at 118, this Court should exercise its independent constitutional judgment to resolve any doubt about the authority and duty of state courts to implement treaty obligations that the federal political branches freely accepted and want to honor. The presumption in favor of compliance with international obligations will also put to rest a long-festering dispute with one of our closest neighbors.

Prior to the Vienna Convention, disagreements over the treatment of U.S. nationals in Mexico and Mexican nationals in the United States – including instances of denial of consular access – frequently led to diplomatic protests and international arbitration.[39] Codification of consular law in the Vienna

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39. *See* 4 HACKWORTH 830-837 (1942); 7 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 626-658 (1970) [WHITEMAN], 8 WHITEMAN 807-837. In the 1920s, a U.S.-Mexican claims commission held that "a foreigner, not familiar with the laws of the country where he temporarily resides, should be given [the] opportunity" of consular access. *Walter H. Faulkner* (U.S. v. Mex.), Opinions of the Commissioners Under the Convention Concluded September 8, 1923 (1927) at 86, 90; *see also* 4 HACKWORTH 830. Conversely, where California officials did not give the Mexican consulate access to a detained Mexican citizen, the Department of State stressed the importance of California's compliance with standards maintained by the United States in its dealings with other countries:

> Even in the absence of applicable treaty provisions this Government has always insisted that its consuls be

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Convention has produced greater certainty of substantive rules in consular matters,[40] and the creation of a multilateral mechanism for binding settlement of consular disputes in the Optional Protocol obviated the need for a special arbitration agreement between the United States and Mexico to resolve a consular dispute.[41] The United States voluntarily accepted the Optional Protocol when it ratified the Vienna Convention in 1969,[42] and Mexico's subsequent acceptance of the same obligation created the necessary consent-based reciprocity for

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> permitted to visit American citizens imprisoned throughout the world and it is believed that if [the] attitude [of the] District Attorney is maintained in [the] instant case there will be repercussions in Mexico and perhaps other countries unfavorable to American citizens.

4 HACKWORTH 836.

40. Codification of consular law was undertaken by the U.N. International Law Commission and a diplomatic conference. *See* 1961-II Y.B. INT'L L. COMM'N 88-128. The United States played a leading role in negotiating the specific wording of Article 36 of the Convention and the Optional Protocol. *See* Report of the United States Delegation to the Vienna Conference on Consular Relations, *reprinted in* Sen. Exec. E, 91st Cong., 1st Sess., May 8, 1969, at 41, 59-61 [Report of U.S. Delegation].

41. The United States actively advocated the provision that became the Optional Protocol and resisted others' efforts to eliminate or weaken dispute settlement. *See* Report of U.S. Delegation at 72-73. The formulation from the Vienna Conference, fully supported by the United States, was an Optional Protocol that states would be free to accept or not; upon acceptance, a binding obligation would be created. *Ibid.*

42. Withdrawal from the Optional Protocol does not affect the U.S. obligation to abide by the *Avena* judgment. At the same time as the announcement of withdrawal from the Protocol, the United States reaffirmed its commitment to comply with the *Avena* judgment. The State Department spokesman said (in response to a question): "The bottom line is we believe in the international system, we are committed participants in the international system, as reflected by . . . our decision to comply with the judgment." Dep't of State Daily Press Briefing (Mar. 10, 2005), *available at* http://www.state.gov/r/pa/prs/dpb/2005/43225.htm.

either state to sue the other on any dispute involving interpretation or application of the Convention.

No state can unilaterally determine the definitive meaning of an international treaty.[43] Thus, in a dispute under the Vienna Convention, the United States cannot impose its own view on Mexico (or on any other treaty partner),[44] or establish the measure of its own treaty compliance. Nor can disputes over the application of the Vienna Convention to particular facts, or over the remedy for breach, be determined by the United States as one party to the dispute. In this case, the United States agreed that the ICJ would be the decision-maker.

The jurisprudence of this Court accepts the authority of the federal government to settle disputes with foreign governments in a manner that binds state as well as federal courts. In *Belmont*, *Pink*, and *Garamendi*, this Court found that the federal policy of the United States adopted in the context of definitive resolution of long-festering disputes would displace contrary state law. In *Dames & Moore v. Regan*, 453 U.S. 654, 679-80 (1981), this Court explained that claims by nationals of one country against another can be "sources of friction" in international relations and that dispute settlement procedures

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43. *See Jesse Lewis (The David J. Adams) Claim* (U.S. v. Gr. Br., 1921), 6 U.N. Rep. Int'l Arb. Awards 85 (British court decision could not be conclusive of meaning of U.S.-British treaty; arbitral tribunal had competence to interpret the treaty authoritatively). *See also Mitsubishi*, 473 U.S. at 629; *Bremen*, 407 U.S. at 9 (U.S. courts should not "insist on a parochial concept that all disputes must be resolved under our laws and in our courts.... We cannot have [international dealings] exclusively on our terms, governed by our laws, and resolved in our courts.").

44. For this reason, U.S. courts ought to give careful consideration to judgments of foreign or international courts in treaty cases. *Cf. Olympic Airways v. Husain*, 540 U.S. 644, 660-61 (2004) (Scalia, J., dissenting). Where a tribunal has been accepted by the U.S. political branches as the forum for binding settlement of treaty disputes, it is not open to a state court to reexamine the questions resolved in the international judgment. *Cf. Medellín v. Dretke*, 544 U.S. 660, 662, 670-71 (2005) (Ginsburg, J., concurring).

accepted by the U.S. political branches are a traditional and proper method for resolving such grievances. Whatever might be the limits of federal authority to resolve disputes with foreign governments in some hypothetical scenario not involved here, it falls clearly within the core of federal power under the Constitution to accept the outcome of a treaty-based dispute resolution process as definitively settling a dispute over treatment of foreign nationals by the states and for this Court to ensure that state courts carry out the treaty-based judgment.

Refusal to grant review and reconsideration of petitioner's conviction and sentence as required by the ICJ would compound the treaty violation that occurred when the Texas authorities failed to inform petitioner of his right to communicate with the Mexican consulate. Such a refusal to accord this treaty-based remedy for a treaty violation would prejudice the U.S. ability to insist on compliance by other states with their obligations under the Vienna Convention toward the millions of U.S. nationals who visit or work in Mexico and in the other 169 parties to the Convention.[45]

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45. On rare occasions of U.S. failure to implement obligations resulting from dispute settlement (as with prolonged noncompliance with the *Chamizal* arbitral award in Mexico's favor), detriments to U.S. economic and political interests are well-documented. *See* SHELDON B. LISS, A CENTURY OF DISAGREEMENT: THE CHAMIZAL CONFLICT, 1864-1964 68-69, 75-77, 86-88, 95-97, 100-03 (1965); ANTONIO GÓMEZ ROBLEDO, MÉXICO Y EL ARBITRAJE INTERNACIONAL 161 (1965); Percy Don Williams, Jr., *Fifty Years of the Chamizal Controversy – A Note on International Arbitral Appeals*, 25 TEX. L. REV. 455, 461-462 (1947) (problems in negotiating with Mexico over expropriation of U.S. properties, in view of noncompliance with *Chamizal* award); FRANCIS J. WEBER, THE UNITED STATES VERSUS MEXICO: THE FINAL SETTLEMENT OF THE PIOUS FUND 42-50 (1969) (linkage between U.S. rejection of *Chamizal* and Mexico's suspension of payments under *Pious Fund* award). President Kennedy said that because of the U.S. refusal on *Chamizal*, "Mexico has been unwilling to take any other matter to arbitration, which has, of course, therefore lessened the harmony between the two countries." *See Kennedy Says U.S. Was Wrong in Mexico Border Disagreement*, N.Y. TIMES, Jul. 6, 1962, at 4, 8.

Ultimately, it is the decision of this Court that must have conclusive effect under the Constitution.[46] It would be a justified assertion of the role of this Court, within our constitutional system of federalism and separation of powers, for the Court to exercise the federal judicial power to give effect to the legal obligations of the United States embodied in the *Avena* judgment.

CONCLUSION

Amici urge this Court to ensure that actions and omissions of the state of Texas are remedied by the courts of that state, as the proper organs to bring about compliance with the *Avena* judgment. Refusal to grant the remedy for the Vienna Convention violations that has been determined by the ICJ in its judgment regarding petitioner's treaty claims would undermine the U.S. ability to insist on compliance by other states with their obligations under the Vienna Convention. Review and reconsideration of petitioner's conviction and sentence is necessary to avoid the adverse consequences that would result from failure to comply with the *Avena* judgment, which could include prejudice in connection with dispute settlement under other treaties.

By remanding with instructions to afford the remedy of review and reconsideration to redress the violation of the treaty as required by the *Avena* judgment, this Court would fulfill its responsibility within our constitutional system and would sustain compliance with the international obligations of the United States.

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46. *See* RESTATEMENT, § 112(2) ("The determination and interpretation of international law present federal questions and their disposition by the United States Supreme Court is conclusive for other courts in the United States") and comment *a*.

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APPENDIX

APPENDIX – LIST OF *AMICI*

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Thomas M. Franck is Murry and Ida Becker Professor of Law Emeritus at New York University. He served as judge ad hoc of the International Court of Justice in *Sovereignty Over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia), 2001 ICJ 575, and as counsel for Chad in *Territorial Dispute* (Libya/Chad), 1994 ICJ 6, and for Bosnia-Herzegovina in the cases concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia-Herzegovina v. Serbia-Montenegro), 1993 ICJ 3, 325, 1996 ICJ 595, 2007 ICJ No. 91, and *Application for Revision of the Judgment of 11 July 1996* (Yugoslavia v. Bosnia-Herzegovina), 2003 ICJ 7.

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Appendix A

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Bernard H. Oxman is Richard A. Hausler Professor of Law at the University of Miami and a former Assistant Legal Adviser of the U.S. Department of State. He was a legal consultant for the United States in *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/U.S.), 1984 ICJ 246. He served as a judge ad hoc of the International Tribunal for the Law of the Sea in 2003 and has been appointed as a judge ad hoc of the International Court of Justice in *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), 2004 ICJ No. 132.

Appendix A

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Stephen M. Schwebel was a judge of the International Court of Justice from 1981 to 2000 and its president from 1997 to 2000. Previously he served for fourteen years in the Office of the Legal Adviser of the U.S. Department of State, including as Assistant Legal Adviser and Deputy Legal Adviser, in which offices he represented the United States in the *Certain Expenses of the United Nations* advisory opinion proceeding, 1962 ICJ 163; *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 ICJ 7, 1980 ICJ 3; and in the advisory opinion proceeding on *Interpretation of the Agreement of 25 March 1951 between the World Health Organization and Egypt*, 1980 ICJ 73.

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